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In The

Supreme Court of the United States

October Term, 1997

DOY LEE McCLENDON, GIL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEVEN McMILLAND and PAUL AHMANN,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari
To The Washington State Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under Washington State's former statutory scheme relating to issuance of a probationary license where an individual showed, at the time of arrest, a breath alcohol level of .10 percent or more and the individual is issued a license which can result in an enhanced jail sentence should the individual be convicted in the future of DUI arising from a new incident, is the Double Jeopardy Clause of the U.S. Constitution violated?

2. Does the issuance of a probationary license status constitute punishment as that term is considered under federal double jeopardy analysis?

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I. STATEMENT OF THE CASE

As Petitioners note, this case involved a challenge to Washington State's statutory scheme enacted in 1994 by Laws of Washington 1994, Chapter 275. The statutes enacted in 1994, RCW 46.61.5051 and RCW 46.61.5052, were repealed in 1995, effective September 1, 1995. See Laws of 1995, 1st. Sp. Sess., ch. 17 and Laws of 1995, ch. 332, sec. 21; Laws of 1995, 1st, Sp. Sess., ch. 17, *State v. McClendon,* 131 Wn.2d 853, 860, 935 P.2d 1334 (1997).[1]

Further, Petitioners have properly set for the Findings of Fact and Conclusions of Law adopted by the Whitman County District Court, the trial court. For the Court's full review and consideration, the Respondent has attached, as Appendix "A", the Agreed Narrative of Report of Proceedings signed by the Whitman County District Court Judge, the Honorable David J. Frazier, on June 16, 1995.[2]

It is sufficiently important to note that these individuals have never faced trial in the criminal court nor have their licenses been suspended in any fashion. They have merely had a "probationary status" attached to their licenses in the form of an asterisk (*).

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[1] RCW 46.20.365(3)(a) relating to issuance of probationary licenses was also repealed in 1995. See *McClendon* at 859, footnote 8.

[2] It should be noted that the Appendix A lists eight (8) Respondents to the District Court's action. The first five (5) Respondents are Petitioners before this Court. The other three (3) have since abandoned this litigation.

It is further true that if these Petitioners had been *convicted* on a further and subsequent driving while under the influence of drugs or alcohol (DUI) charge committed prior to September 1, 1995, they would have been given a minimum sentence of seven (7) days in jail, even if they were acquitted of the current charge which the Washington State Supreme Court reinstated in *State v. McClendon*. Compare Laws of Washington 1996, ch. 307(3) currently codified in RCW 46.61.5055 with the former RCW 46.61.5051 and RCW 46.61.5052. No record exists indicating this occurred to any petitioner.

II. ARGUMENT

A. Washington's former statutory scheme relating to issuance of probationary licenses with enhanced penalties upon future DUI convictions does not violate the Double Jeopardy Clause of the United States Constitution?

Petitioners suggest this Court issue a Writ of Certiorari largely based upon the fact, according to Petitioners, that *Ball v. United States*, 470 U.S. 856, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985) mandates such, and that *United States v. Ursery*, ___ U.S. ___, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996) is largely irrelevant. Respondent respectfully asserts that Petitioners have misinterpreted *Ball*, and have clearly underestimated the effect and holdings of *Ursery*.

Specifically, it is important to note that *Ball* involved multiple convictions for receiving (unlawfully) a firearm that had traveled in interstate commerce in violation of 18 U.S.C. § 922(h)(1) and being a felon in possession of such

firearm in violation of 18 U.S.C. App. § 1202(a)(1) out of the *same* criminal act.

In reversing and remanding for retrial one of the two convictions against Mr. Ball, this Court held:

> "We hold that Congress did not intend a convicted felon in Ball's position to be convicted of both receiving a firearm in violation of [18 U.S.C. § 922(h)(1)] and possessing that firearm in violation of [18 U.S.C. App. § 1202(a)].

470 U.S. at 865.

It is important to note that this Court was interpreting a federal statute, just as the Washington Supreme Court did with former RCW 46.61.5051 and RCW 46.61.5052 and current RCW 46.20.365 and RCW 46.20.355 in the case at bar.

Additionally, ten years later in *Witte v. United States*, 515 U.S. ___, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995), this Court considered at length the issue of whether subsequent prosecution for conduct considered at a sentencing on a different charge was inappropriate and violative of the Double Jeopardy Clause of the Fifth Amendment. Specifically, this Court noted at p. 2205:

> "Against this background of sentencing history, we specifically have rejected the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime."

This holding was joined in by every member of the Court except Justice Stevens. (See J. Stevens at 2210 et seq.)

In fact, two justices, Scalia and Thomas, would specifically only use double jeopardy principles where successive *prosecutions* were involved, not merely successive punishment alleged but not found in *Witte*. (See J. Scalia joined by J. Thomas at 2209-2210.)

The reasoning in *McClendon* and *Witte* is not inconsistent with the holding of *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989) wherein it was stated at pp. 448-449:

> "We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution."

(Emphasis mine).

It is clear that a majority of the Washington State Supreme Court in the case at bar clearly found the former statutes challenged by Petitioners to be remedial in purpose and effect. *McClendon* at 863-864.[3]

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[3] Even J. Alexander, concurring in dissent and speaking for J. Johnson and J. Madsen, disagrees with J. Sanders' dissent suggesting if a sanction is partially remedial and partially punitive, it always violates the Double Jeopardy Clause of the United States Constitution. *McClendon* at 876-877. Respondent State of Washington suggests their real problem with the "legislative scheme" relates to the future enhancement penalty based upon purely administrative action may have been a due process, *not* double jeopardy, problem. This issue was not raised in the Washington Supreme Court or this court. See J. Talmadge, concurring, footnote 58 at 874.

There is no significant basis to conclude that the issuance of the probationary licenses under the former Washington statutes in any way violated the Double Jeopardy Clause of the United States Constitution, even prior to the *Ursery* decision.

B. *United States v. Ursery.*

Petitioners contend on pages 8 and 9 of their Petition that *Ursery* is largely irrelevant to the discussion involved.

Significantly, *Ursery* clearly reiterated *Halper's* narrow scope and how the Sixth Circuit in *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995) and the Ninth Circuit in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) had misread not only *Halper* but *Austin* [*Austin v. United States*, 509 U.S. 602, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993)] and *Kurth Ranch* [*Montana v. Kurth Ranch*, 511 U.S. 767, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994)]. Rehnquist, C.J. in *Ursery* at 564.

Petitioners attempt to "bootstrap" review by attempting to tie into this Court's in rem versus in personan distinction as to *forfeitures*. Do Petitioners suggest that immediate forfeiture of a state-issued license is a lesser "penalty" than the inchoate possibility of enhanced jail time after a second arrest and conviction for DUI? This would be an analomous and weak argument at best. Several State courts have allowed such an administrative action without finding double jeopardy. See *Tench v. Com.*, 21 Va. App. 200, 462 S.E.2d 922, 923-24 (Va. App. 1995); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630, 42 Cal. Rptr. 422, 427-28, ___ P.2d ___ (Cal. App. 1

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It is important to note, as Petitioners state, that both opinions of concurring Justice Talmadge and of Justice Alexander who concurred in the dissent of Justice Sanders, found *Ursery* to be significant and to somewhat diminish Petitioners' argument. See at *McClendon* at 870, footnote 55 and *McClendon* at 876.

C. The issuance of the probationary license under Washington's former statutes to Petitioners does not constitute punishment as that term is considered under federal or state interpretation of the Double Jeopardy Clause of the United States Constitution.

Petitioners believe that the mere issuance of a probationary license, with no further action on the part of the Washington Department of License, constitutes punishment thus implicating double jeopardy concerns. Respondent contends that this is not only inconsistent with the Washington Supreme Court in *McClendon* but inconsistent with harsher situations to drivers such as administrative license revocations involving DUI convictions in separate proceedings in several jurisdictions. Many of these instances are cited by Justice Talmadge in his detailed concurring opinion at pages 869-874 of *McClendon*.

Additionally, as Justice Talmadge succinctly points out in footnote 55 at page 870 in taking issue with Justice Sanders' dissent:

> The dissent (J. Sanders) relies on our language in *State v. Clark*, 124 Wn.2d 90, 98, 875 P.2d 613 (1994): "[A] forfeiture statute must be solely remedial to escape characterization as 'punishment' under the federal double jeopardy clause." *Clark*, in turn, relied on *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) for the same wording. *Clark*, 124 Wn.2d at 100. Leaving aside the important question of whether the same considerations that apply in the civil forfeiture arena in the context of driver license administration, the Supreme Court has decided that "the holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence." *United States v. Ursery*, ___ U.S. ___, 116 S. Ct. 2135, 2147, 135 L. Ed. 2d 549 (1996). The dissent evidently believes the Supreme Court is wrong about this and relies heavily on *Austin* for its double jeopardy analysis. We are bound to observe the Supremacy Clause: the Supreme Court's rulings on double jeopardy under the federal constitution control. We have said our state constitution provides no greater double jeopardy protection than the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995).

Further, Justice Talmadge goes on to conclude in a stinging footnote which aptly appears consistent with not only the plurality in *McClendon* but with *Ursery* in footnote 59, page 875:

> The dissent's (J. Sanders) conclusion that the issuance of a probationary license is punishment is strange. As a consequence of the issuance of the probationary license in this case, precisely nothing happened to the respondents. (The Petitioners in this case). They were not deprived of life, limb, liberty or property. Nor was there any effect whatsoever on their privilege to drive in Washington. In fact, even though their BAC Datamaster test indicated they were driving with more than the legal limit of alcohol in their systems, they have not been tried for drunk driving because the court below dismissed the charges against them. *The respondents have not been punished.* "The risk to which the Double Jeopardy Clause refers is not present in proceedings that are not 'essentially criminal.' " *Breed v. Jones,* 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975). It is only upon the contingency of a *future* charge for DUI that the effect of the probationary license springs to life. I *cannot comprehend how the [Double Jeopardy] Clause can apply to something that has not yet happened, and may never happen, to require dismissal of the DUI charges in this case.*

(Emphasis mine)

III. CONCLUSION

Petitioners have cleverly attempted to convince this Court to take this case based on the grounds that the mere issuance of the probationary drivers license constitutes punishment thus violating the federal Double Jeopardy Clause, although no criminal conviction has been

had in any case at bar nor would any enhanced punishment exist unless and until a second, subsequent, DUI conviction against any of these defendants occurs within five (5) years.

This is, as the concurring opinion by Justice Talmadge, notes, *strange* to say the least. Petitioners have not been punished and the Double Jeopardy Clause is not, therefore, implicated.

Significantly, only dissenting Justice Sanders seems to accept Petitioners' requested conclusion in *McClendon*.

Further, this Court is well aware of historical roots of numerous state licensing actions as being independent and separate of court proceedings and remedial in effect. Washington is no different in that regard, and has not been different in that regard at least since the Washington Supreme Court decided *State v. Scheffel*, 82 Wn.2d 872, 514 P.2d 1052 (1973), *appeal dismissed*, 416 U.S. 9654 (1974).[4]

Confusion in lower Courts – such as the Whitman County District Court and various other courts in the United States like the Sixth and Ninth Circuits prior to this Court's *Ursery* opinion – occurred because these lower courts have failed to follow this Court's caveat that double jeopardy is only triggered "in the rare case." *Halper* at 449. Specifically, Respondent respectfully submits that those lower courts and Justice Sanders in his

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[4] If anything, these probationary licenses were far less restrictive than states where administrative license suspension and revocation occur under similar circumstances in separate proceedings. (See *McClendon* at 870-75, J. Talmadge, concurring; See, also, J. Stevens, dissenting in *Ursery* at 2161, footnote 23.)

dissent have failed, fundamentally, to follow the very specific warning Justice Kennedy pronounced in *Halper* when he stated in his concurring opinion at page 453:

> "Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. (Citations omitted). Such an inquiry would be amorphous and speculative and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name. It also would breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands."

Respondent respectfully submits that this court deny Petitioners' requested Writ of Certiorari and leave standing the opinion of Washington State's highest court.

Respectfully submitted,

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Prosecuting Attorney
Attorney for Respondent
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APPENDIX "A"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WHITMAN

STATE OF WASHINGTON, Appellant, vs. DOY LEE McCLENDON, GIL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEPHEN STARK, BRIAN HAYTON, MARK BOOTH, Respondents.	NOS. 95-1003D, 94-1638D, 95-1066D, 95-1053Y, 95-1021D, 95-1122D, 95-1162D, 95-1165D 95-1-00040-4 AGREED NARRATIVE OF REPORT OF PROCEEDINGS

Doy L. McClendon, Gil Crosby, Sally Parrish, Frank Sayre, Richard Triquart, Stephen Start, Brian Hayton and Mark Booth were arrested for suspicion of violating RCW 46.61.502 on 12/9/94, 11/19/94, 12/2/94, 1/31/95, 12/18/94, 2/3/95, 2/9/95, and 3/5/95 respectfully. Each defendant submitted to a BAC Datamaster Verifier test in compliance with RCW 46.20.308 and all relevant Washington Administrative Code provisions. Each defendant registered a breath test result of .10 or higher. All defendants were issued temporary licenses and advised of their right to an administrative hearing pursuant to 46.20.365. And, all defendants were issued probationary licenses as a result of their performances on the breath test.

Subsequent to the issuance of the probationary licenses the Whitman County prosecutor's office initiated criminal actions in the Whitman County District Court for alleged violations of RCW 46.61.502 the same conduct. On February 16, 1995, Defense's Motion to Dismiss for Violation of Double Jeopardy was filed. On February 21, 1995 the State's response was filed. Argument on this issue was heard by Judge Frazier on March 3 and March 8, 1995. Judge Frazier reserved ruling on the matter. On April 17, 1995, Judge Frazier ruled in favor of the State finding that subjecting a defendant to a civil proceeding which seeks imposition of a probationary driver's license did not constitute punishment. On April 18, 1995, defense counsel filed Defendant's Motion for Reconsideration. On April 27, 1995, Judge Frazier reversed his decision of April 17, 1995, ruling in favor of the defense and citing *State v. Calle*, 125 Wn.2d 769 (1995), but reserving ruling on the appropriate remedy. On May 1, 1995, over the objections of the State, on the ground of lack of notice, the above-entitled cases were consolidated and Findings of Fact and Conclusions of Law were entered granting the defense Motions to Dismiss. On May 9, 1995, the State filed a timely Notice of Appeal.

DATED this 16th day of June, 1995.

/s/ David Frazier
Judge David Frazier

Presented by:

JAMES H. KAUFMAN
Whitman County Prosecuting Attorney

By: /s/ Paul J. Szott
PAUL J. SZOTT
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